(14)

No. 96-663

In the
Supreme Court of the United States
October Term, 1996

MARVIN KLEHR AND MARY KLEHR

Petitioners,

v.

A.O. SMITH CORPORATION AND
A.O. SMITH HARVESTORE PRODUCTS, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY BRIEF

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MISCELLANEOUS

I. The Purpose And Intent Of RICO Is Compromised By The Eighth Circuit's Rule of Accrual.

Contrary to the statement of Respondents, no court has held that the Petitioners actually knew that the Harvestore silo was the source of their injuries in the 1970's. Resp. Br. at 11. It is uncontroverted that Petitioners did not subjectively know of the fraud until 1991, when the expert came to their farm. Instead, the Eighth Circuit held that the plaintiffs *should have* discovered their injury and its source. Pet. App. at A-15. It is this critical distinction which Respondents fail to address anywhere in their responsive brief. The Eighth Circuit's rule of accrual penalizes an unknowing plaintiff while permitting a defendant who continues to engage in criminal mail fraud to literally "keep robbing the bank" with impunity once the original statute of limitations has passed. Deceit is more reprehensible than negligence, and should not be rewarded. BMV of North America v. Gore, 64 USLW 4335, 116 S. Ct. 1589, 1599 (1996).

The fact that the damages may be similar to past damages or a continuation of past damages is of no help to Respondents. Petitioners, if they had known of the fraud, would have stopped using the silo earlier and prevented further damages, just as they did in 1991 when they finally learned the truth. A rule that allows damages to continue to accrue indefinitely through *continuous fraudulent acts*, even if the damages are identical or the continuing fraudulent acts which cause them are identical, defeats the purpose and intent of the RICO act.

If this court adopts a rule of accrual similar to the Keystone rule, the result would be different. Here, like Keystone, but unlike Glessner, there were new predicate acts *and* continuing injury. Keystone Ins. Co. v. Houghton, 863

F.2d 1125 (3rd Cir. 1988); Glessner v. Kenny, 952 F.2d 702 (3d Cir. 1991). Respondents fail to recognize or discuss this important difference in these two cases. Even if a separate accrual rule was established by this court, Petitioners would still have a claim for damages proximately caused by the predicate acts occurring within the statute of limitations.

II. Where There Is Continuing Fraud, The Circuit Courts Differ On Application Of The Equitable Tolling Doctrine.

Once again, Respondents misstate the findings of the Eighth Circuit. That court made no finding that the Petitioners had knowledge of the facts constituting their cause of action. Resp. Br. at 18. Instead, the Eighth Circuit's entire discussion of equitable tolling of the RICO claim is discussed in fn. 11, Pet. App. A-17, where it is stated "the Klehr's failure to act with due diligence precludes application of this doctrine." In other words, the Eighth Circuit never reached an analysis of the scope, magnitude or potential effect of the fraudulent concealment. Upon close, logical analysis, this rule makes the "equitable exception" based on fraudulent concealment meaningless, because the victim is *always* required to exercise the same level of due diligence. The victim's due diligence is *never* measured through the prism of the continuing fraud and it's effect on the victim.

Respondents concede that there are differences in the circuits, but claim they are "more illusory than real." Resp. Br. at 18. However, Respondents completely fail to discuss either Riddell v. Riddell Washington Corp., 866 F.2d 1480 (D.C. Cir. 1989), a RICO case previously cited by the Petitioners, or Hobson v. Wilson, 737 F.2d 1 (D.C. Cir. 1984), both of which hold that the defendant's conduct in fraudulently concealing the cause of action is analyzed *before* the plaintiff's due diligence is

determined. Moreover, due diligence is not based upon an "inquiry notice" standard, but is instead measured by whether the plaintiff was unaware of facts supporting a crucial element of his claim. See, Hobson, supra, 737 F.2d at 35, and Riddell, supra, 866 F.2d at 1494. The Eighth Circuit's rule of inquiry notice, even in the face of fraudulent concealment (that there "might be a possible fraud"), clearly is in conflict with the rule in the D.C. Circuit and others cited previously.

Finally, Respondents fail to address the merits of the Petitioners' argument, i.e. that the rule on equitable tolling should be different where there is continuing fraud. They have conceded that they continuously mailed numerous pieces of false advertising to the Petitioners and do not contest that a scheme was implemented whereby critical design flaws were actively concealed from the Petitioners and other farmers. In equity, the Petitioner's claims should not be barred until they acquired actual knowledge of the fraud.

III. The Order Of July 29, 1996, Is The Final Judgment Of The Eighth Circuit From Which Appeal Lies To This Court.

This Court has jurisdiction of this appeal because the petition was timely filed. The Circuit Court extended the time for filing by one day. The Respondents' argument fails because they rely on cases that are distinguishable and the basis of the argument is a docket sheet which has no evidentiary value.

Petitioners Marvin Klehr and Mary Klehr prepared and filed a *pro se* petition for rehearing after receipt of the decision of the Eighth Circuit dated June 6, 1996. They mailed the petition on June 20, 1996, and it was received by the clerk on June 21, 1996. Resp. Br., A-9. Although the clerk received the petition on the 15th day following the Eighth Circuit's decision, the court accepted the petition for filing. At no time was notice

given by the court to the parties that the petition was either untimely received or untimely filed. Instead, the Eighth Circuit considered the petition on the merits and, after due consideration, denied it. Pet. App., C-1. The order states as follows:

> The petition for rehearing *filed* by the appellants' [sic] *has been considered by the court* and is *denied*. (Emphasis added).

This order is, in all respects, the same order routinely used by the Eighth Circuit in denying any timely filed petition for rehearing. Compare, Harrison v. Dahm, 911 F.2d 37, 38 (8th Cir. 1990), where the court vacated an order denying a petition for rehearing *as untimely filed*. The order in this case does not state that it was not considered because it was untimely. Indeed, it would not take nearly six weeks to deny a petition for rehearing on the basis that it was untimely filed.

In addition to the court's own statement that it "considered" the petition, proof that the petition was considered on the merits lies in the fact that the court did not issue its mandate until August 9, 1996. Resp. App., A-9. The circuit court would have been required by F. R. App. P. 41(a) to issue its mandate by June 27, 1996, if the opinion of June 6, 1996 had been the final judgment of the court. The mandate of the court *must* issue 7 days after the expiration of the time for filing a petition for rehearing. Ibid. Only the *"timely* filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court." (Emphasis added). See also F.R. App. P. 26(b)(the circuit court can, on its own motion, extend the time for filing a petition for rehearing). Braniff Airways, Inc. v. Curtiss-Wright Corp., 424 F.2d 427 (2d Cir. 1970) (cert. den. 400 U.S. 829) (court of appeals has power to enlarge time to modify petition for rehearing although the

time for rehearing may have expired). Because the mandate was not issued until August 9, 1996, it is clear that the court of appeals extended the time for filing the petition for rehearing, that it was considered on the merits and that the court considered its order of July 29, 1996 to be the final judgment of the court. F.R. App. P. 41(a). See, Missouri v. Jenkins, 495 U.S. 33, 48, fn. 17 (1990) (discussing rule 41(a)).

Respondents rely upon the docket text. While the docket text establishes the date the petition was *received*, it has no further evidentiary value as to whether the petition was timely *filed*. The docket text itself does not state that the petition was untimely filed, nor does it state that the petition was denied because it was untimely filed. The unknown clerk who wrote the text has no authority to make or interpret orders from the Eighth Circuit. For purposes of maintaining the docket and its form, the clerk is under direction and control of the Director of the Administrative Office of the United States Courts, and not the judges who considered the petition for rehearing. F. R. Civ. App. 45(b). In spite of this, the carefully chosen words used are "untimely received," and not "untimely filed."

The Eighth Circuit's authority to accept the *pro se* petition for filing and to consider it on the merits, is in accord with prior decisions of this court. In Bowman v. Loperena, 311 U.S. 262, 266 (1940), the court stated:

> The filing of an untimely petition for rehearing which is not entertained or considered on its merits, or a motion for leave to file such a petition out of time, if not acted on or if denied by the trial court, cannot operate to extend the time for appeal. But where the court allows the filing and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until

such denial, and the time for appeal runs from the date thereof.

The cases cited by Respondents are not applicable on their facts. In Allegrucci v. U.S., 372 U.S. 954 (1963) the petition for rehearing was filed *after* the petition for certiorari was filed and expressly for the purpose of curing the timeliness defect. See, discussion of this case in Stern et al., Supreme Court Practice, 7th Ed., p. 279. This is impermissible, (Missouri v. Jenkins, supra. at 439), but it is not what happened in this case.

In Dept. of Banking v. Pink, 317 U.S. 264, 266 (1942), the New York Court of Appeals issued judgment and a motion to amend the remittitur was later filed to have the court "declare what had in fact occurred upon its previous decision of the case." This Court said the motion to amend the remittitur did not have the effect of extending time because it "did not seek to have the Court of Appeals reconsider any question decided in the case"--unlike a petition for reargument or rehearing. In this case, there has been a timely petition for rehearing involving the merits of the dispute.

Missouri v. Jenkins, supra, dealt with the issue of whether a petition for rehearing en banc was to be treated as a petition for rehearing for purposes of tolling the 90 day period to file a petition for certiorari. The case merely restated the general rule that the 90 day time limit is mandatory, and that the time can be tolled through filing a petition for rehearing. There was no discussion of the issue presented here.

Federal Trade Comm. v. Minneapolis Honeywell Regulator Co., 344 U.S. 206, 211-13 (1952), involved a situation where there was no petition for rehearing, and the FTC filed a memorandum with the circuit court relating to parts I and II of a cease and desist order, but not requesting alteration or modification of part III. The circuit court issued a "final decree"

but made no change in substance to its previous ruling. The FTC sought to appeal from part III of the order, more than 90 days after the original ruling, but within 90 days of the "final decree". This court rejected the petition because the FTC "memorandum" was not a petition for rehearing requesting a change in substance of part III of the original order. The original decision of the circuit court stood as the final judgment from which appeal would be taken to this Court.

Of note is the fact that this Court, in FTC v. Minneapolis Honeywell, supra, recognized the existence of the rule Petitioners seek to invoke in this case. "Petitioner refers us to cases which have held that when a court considers on its merits an untimely petition for a rehearing, or an untimely motion to amend matters of substance in a judgment, the time for appeal may begin to run anew from the date on which the court disposed of the untimely application." 344 U.S. at 210 (citing Loperena, supra and other cases.)

The purpose of the rule extending the time to appeal when a petition for rehearing is filed is to make sure that this Court is reviewing the *final* judgment of the circuit court. As stated in Department of Banking v. Pink, 317 U.S. 264, 268 (1942):

> For the purpose of the finality which is prerequisite to a review in this court, the test is...whether the record shows that the order of the appellant court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a...court...the object of the statute is to limit the applicant's time to three months from the date when the *finality* of the judgment for purposes of review is established. (Emphasis added).

In this case, the denial of the petition on July 29, 1996, stands as the final judgment of the Eighth Circuit from which appeal lies to this court. Accordingly, because this petition for certiorari was filed within 90 days of July 29, 1996, it is timely.

This court has jurisdiction to hear this appeal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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